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In The
Supreme Court of the United States

October Term 1959

No. 210

RICHARD GARVIN, LAVERLE GARVIN, also known as F. C. PETE GARVIN, JOHN B. GARVIN, MADGE GARVIN VENDEVER, LILLIAN ESTELLE BIBLE, LUCRETIA MAY RICHARDS, HERBERT GARVIN, ROY D. GARVIN, OMA PEARL GARVIN, WINSTON B. GARVIN, and JAMES ROBERT GARVIN,

Petitioners,

VERSUS

H. C. PETEGREW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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1960.

OKLAHOMA BRIEF CO., COMMERCE EXCHANGE BLDG., OKLAHOMA CITY, PHONE CE 5-2969

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There is filed herewith under separate cover a certified Transcript of the Oklahoma Supreme Court record in this case. Such record has not been printed below.

Petitioners pray that writ of certiorari issue herein to review the final judgment, decision and opinion (Tr., p. 179)

of the Supreme Court of the State of Oklahoma (Case No. 36,797) filed in the above entitled case on June 17, 1958; dissenting opinion was filed March 8, 1960 (Tr., 193); second and final petition for rehearing was denied April 5, 1960 (Tr., 218).

The majority and dissenting opinions of the Oklahoma Supreme Court in this case are now officially reported in 350 Pacific Reporter, 2d Series, pages 970 to 982. Nine copies (printed pamphlet form) of Pac. 2d advance sheet for May 13, 1960, containing such majority and dissenting opinions in full, are filed herewith.

OPINIONS BELOW

This case originated in 1953 in the District Court of Stephens County, Oklahoma, wherein is located the land and oil and gas royalty rights involved.

Respondent here was plaintiff therein, and petitioners here were defendants in the trial court.

Plaintiff sought to quiet title to 380 acres of land, but the real object of the suit was to cancel a written contract, executed, acknowledged and recorded in 1923 (Tr. 83); which 1923 contract is also copied in full in the majority and dissenting opinions together; a small significant part thereof being omitted from the majority opinion; which respondents claim vested in Lucretia M. Garvin, their deceased mother and grand-mother, her heirs, executors, administrators and assigns permanent nonparticipating oil and gas royalty rights

in the 380 acres as well as other lands and which mineral rights she had never sold or released by conveyance during her life-time and which they inherited from her in 1931 on her intestate death.

The trial court held in favor of petitioners, upheld such 1923 contract as claimed by them and vested in them full title to 8 1/9 per cent of oil and gas royalty under the 380 acres involved, and entered its judgment (Tr., 150), all to that effect, on January 28, 1954.

Thereafter the trial court on September 10, 1954, vacated its said judgment and sustained motion for new trial for plaintiff (Tr., 167) on inadequate and unjustified grounds and an inapplicable Kansas decision, from which defendants and petitioners appealed to the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma not only affirmed the trial court in vacating the trial court's former judgment and in granting new trial, but in its opinion complained of, also, held that the 1923 contract had been released and was ineffective on entirely inadequate and unsupportable grounds.

The Oklahoma Supreme Court majority and dissenting opinions (350 Pac. 2d 970-982) are voluminous, and we are appending such opinions and separately presenting them by referring to the official reporter citation thereof, and further by filing herewith nine copies of the Pacific Reporter 2d Series advance sheet of May 13, 1960, containing said opinions in full.

If this is not sufficiently in compliance with the rule or if we should file additional copies of this advance sheet or have such opinions printed or otherwise appended, we will cheerfully and promptly do whatever is necessary and proper on being appropriately advised.

JURISDICTION

The judgment and opinion complained of herein was rendered by the Supreme Court of Oklahoma, the highest Court in that State; petitioners have no further remedy or forum under the laws of Oklahoma; the entry of said final judgment and opinion of the Supreme Court of Oklahoma occurred upon the consideration and denial of petitioners' second petition for rehearing by such Court (Tr., 218) on April 5, 1960; said Supreme Court of Oklahoma on April 11, 1960, entered its order (Tr., 219) to issue mandate herein but to stay enforcement thereof until July 1, 1960, pending filing of petition for writ of certiorari by plaintiffs in error (petitioners herein) in the Supreme Court of the United States, and on June 27, 1960, the Supreme Court of Oklahoma entered its further order (Tr., 220) further staying enforcement of said mandate until July 5, 1960, providing that petition for writ of certiorari be filed by petitioners on or before such date in the Supreme Court of the United States that enforcement of such mandate is further stayed until such time as the Supreme Court of the United States rendes

a final decision herein or until further ordered by the Supreme Court of Oklahoma.

The entry of final judgment by the Supreme Court of Oklahoma being April 5, 1960, the ninety days time in which to file petition for writ of certiorari expires on and with July 5, 1960, under rule 34 of this Court, since the 90th day falls on a holiday, July 4th.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1257 (3), because the petitioners' title and rights under said contract of May 10, 1923 and under the original judgment of the trial court in their favor herein, are adversely affected, impaired and sought to and will be destroyed and abrogated by the judgment and opinion of the Supreme Court of Oklahoma on inadequate grounds without a fair trial and without and contrary to due process of law, contrary and without regard to the guaranties of the Federal Constitution, unless certiorari is granted herein.

QUESTIONS PRESENTED

Where four separate husband and wife owners of separate tracts of land and one husband and wife owner of undivided mineral interests in another tract of land, such tracts being near each other and some but not all touching any other, scattered over an area nearly five miles long east and west by two and one-half miles wide north and south, execute, acknowledge and record their written contract in 1923, describing all of said lands and providing that each set of said re-

spective husband and wife owners "shall be the owners of and entitled to" a stated percent "of the royalty accruing or to accrue from all oil and gas or either of them, which may be produced from the above described lands or any part thereof", also providing "This contract, with all the rights and privileges thereof to inure to the benefit of our heirs, executors, administrators and assigns"; and where by suit filed by respondent H. C. Pettigrew in 1953, he being grantee subject to said 1923 contract and son of Thomas Pettigrew and Anna Pettigrew, husband and wife parties to said 1923 contract of 380 acres of land in such contract, said respondent H. C. Pettigrew sought to cancel such contract as to said 380 acres as being void, invalid and ineffective; said suit being against these petitioners, children and grand-children and heirs of Lucretia M. Garvin, party to said 1923 contract; where the trial court upheld the 1923 contract and gave judgment for petitioners, but nearly eight months later vacated such judgment and granted respondent a new trial on inadequate grounds; and on appeal therefrom by petitioners the state Supreme Court upheld vacation of judgment and new trial and also held the 1923 royalty contract released and therefore invalid and ineffective as to the 380 acres because Mr. and Mrs. Garvin in 1930 conveyed their 755 acres of land in said 1923 contract to one Wade, same being different lands and other than the 380 acres, also on unsound and inadequate grounds:

QUESTIONS:

1. Should the final decision and opinion of the Oklahoma Supreme Court based on inadequate and unsound grounds be reviewed and should it be permitted to stand upon claim by petitioners that they have not had a fair trial and that they have been deprived of their property and title and rights without due process of law in violation of the Fifth and Fourteenth Amendments to the Federal Constitution?

2. Especially in view of the following additional general circumstances in the case:

(i) Where the ground relied on by the trial court to vacate its original judgment in favor of petitioners fully upholding the 1923 contract and granting a new trial to respondent, was inadequate and unjustified and was not even accepted and used by the state Supreme Court in its opinion affirming same and holding the 1923 contract released, invalid and not effective as to the 380 acres?

(ii) Where the grounds for the judgment and opinion of the Oklahoma Supreme Court are inadequate, unreasonable and unsound?

(iii) Where the authorities relied on for its conclusion and statements in the opinion of the Oklahoma Supreme Court are entirely inapplicable and the opinion is based on misconceptions and erroneous statements and premises?

(iv) Where both the trial and the state Supreme Court refused to consider competent evidence and acts of the parties

other than and outside the 1923 contract to further ascertain the nature of the contract and intent of the parties?

(v) Where both the trial court and the Oklahoma Supreme Court failed and refused to follow the rules of law both of this Court and of the Oklahoma Supreme Court that the intent of the parties is of paramount importance, and that same should be ascertained and put into effect if possible, and that it is the duty of a court to uphold and sustain a contract if possible, and to give it such construction as will effectuate the intent of the parties if lawful, and that a contract should be judged and interpreted from "its four corners" and not by argumentative statements taken out of context?

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The facts in the case are partially set out in the majority opinion (350 Pac. 2d 970).

DISSENTING OPINION (350 Pac. 2d 975) is important in that the remaining of the necessary facts to a clear understanding of the case are fully set out therein, and also there is a full and clear discussion of the facts and of the inapplicable legal authorities and theories used by the state Supreme Court in its inadequate and erroneous majority opinion. We sincerely urge that petitioners are justly entitled to a final decision herein in line with the reasoning and result

of this dissenting opinion. The language used, the authorities distinguished and therein relied on, and the reasoning and result of the dissenting opinion are clearly those which under the facts and circumstances of this case should in equity and fairness be the final decision and opinion in this case. We urgently request a full consideration of this dissenting opinion.

The 1923 contract involved herein is copied in full in the Transcript (Tr., 83).

Such contract, omitting land descriptions, signatures and acknowledgments, and filing and recording data, is copied in the majority opinion except as to one small part omitted, which is completed in the dissenting opinion.

As recited in the dissenting opinion (350 P.2d 975), the 1923 contract

> "was an agreement by which the parties thereto, for a valuable consideration recited therein, separated or divided only their royalty interest in all lands described in the contract, so that after the contract was executed each of the ten parties thereto owned the stated percentage of the royalty accruing or to accrue from oil or gas thereafter produced from each and all tracts of land described in the contract, *regardless of future ownership of the surface of any such lands*; that the percentage owned by Lucretia M. Garvin as shown by the contract was 12 1/2 percent; that she never conveyed or disposed of her said 12 1/2 percent as to the 480 acres of land here involved and continued to own the same until her death, and that her heirs inherited same and that petitioners now own their inherited portion thereof an undivided 87 1/2 percent of said royalty rights. * * *
>
> "The question whether this contract was a pooling of *land* as contended by plaintiff or a contract *separating or*

dividing royalty interests as contended by defendants is conclusively answered by reading the complete contract. It is thereby disclosed that it could not have been a contract pooling *lands* of the parties because two of the ten parties did not own any land, that is, J. W. O'Quin and Lena O'Quin. However, each of the ten parties did own oil and gas royalty interests, and it was those royalty interests, in the land itself, which was the subject and the only subject of this contract. Eight of the parties owned both land and royalty interests, while two of them owned no land but did own royalty interests. This is conclusively shown when the entire contract is read.

"The effect of the original judgment in the trial court in favor of the defendants was to hold the 1923 contract valid, and have created and *vested*, in J. R. Garvin and Lucretia M. Garvin, their respective heirs and assigns, each an undivided 12 1/6 percent, of perpetual non-participating (in leasing or making leases, bonuses, down-payments and rentals) oil and gas royalty under all the lands described, and divided by the various parties, including the 380 acres here involved; that Lucretia M. Garvin died intestate in 1931, still owning her said interest and left as her heirs her husband J. R. Garvin, and her children and grandchildren, the defendants; that J. R. Garvin thereafter, by quit claim deed conveyed and released to plaintiff, the then owner of surface of the 380 acres, his original interest of 12 1/6 per cent and the title of the Lucretia M. Garvin 12 1/6 percent interest which he had inherited from his said wife Lucretia; that therefore the defendants (as the other heirs of Lucretia M. Garvin) still owned 8 3/4 9 percent of the entire such oil and gas royalty in the 380 acres. The record shows, and it is clearly conceded by all parties, that Lucretia M. Garvin never conveyed or released her royalty interest and that she died owning same, and it is likewise conceded that her husband J. R. Garvin, by his quit claim deed to the plaintiff, Pettigrew on the 380 acres fully divested himself of his original interest as well as his interest inherited from his wife." * * *

"In my opinion it is clearly apparent from the entire record that the 1923 contract is *fully valid and effective*. The parties unquestionably intended to combine or divide and convey their royalty interests, not their land, so that each should share the good fortune of any and of all whose lands produced oil or gas, retaining unto themselves respectively their lands and the rights to lease and to receive bonuses and delay rentals on their own respective tracts of land or to all of same. Also it is clearly apparent, accepting the words used in the contract in their ordinary sense or meaning, that the parties all intended, and in fact said and provided that such contract then and there permanently and perpetually *vested* such non-participating royalty rights or interests as to all the lands, including the 380 acres, in the respective parties, their heirs, executors, administrators and assigns, according to their specified proportions, until released or conveyed by them respectively; and that all the land, including the 380 acres, *was thereafter burdened* with such non-participating oil and gas royalty in perpetuity, *just as though said parties had exchanged and recorded separate royalty deeds on the several tracts.*"

"Such permanent or perpetual non-participating oil and gas royalty interests or estates are recognized whether *created* by conveyances, reservation *or by contract as in the instant case.*" (citing many cases)

"It is the duty of this Court to ascertain and carry out the intention of the parties (citing authorities); and to adopt that construction if it is possible to do so, which will render the contract valid (citing authorities). The present opinion fails to do this, and is based on a misinterpretation of the facts, and mis-application of authorities and on the use of inapplicable decisions."

The writer of the dissenting opinion was joined by two other of the Justices in dissent, only a bare majority of five Justices agreed to the majority opinion, one Justice not participating on account of disqualification.

The 1923 contract seemed to petitioners to be fully valid, legal and effective when they were sued for cancellation thereof, it had never been questioned in 30 years after its being recorded, and therefore they were not surprised when the trial court fully upheld the contract and established in them the royalty rights created, existing and vested thereby; but they were surprised at the action of the trial court nearly eight months later in vacating its judgment and announcing invalidity of the contract solely on the unreasonable and inadequate grounds that it was void under the rules announced in the *Kansas* case of *Lathrop v. Eyestone*, 227 P. 2d 136, and because such contract was and is ambiguous and uncertain and violates the rule against perpetuities. Such *Kansas* case was not in anywise applicable as is shown by the dissenting opinion (350 P. 2d 984). And to further show that the original judgment of the trial court was set aside by it and new trial granted on inadequate and unsubstantial grounds, we have but to call attention to the fact that the majority opinion of the Supreme Court on appeal does not approve nor in any manner rely upon the application of *Lathrop v. Eyestone*.

And petitioners became bewildered, dismayed when on appeal the state Supreme Court wrote the opinion complained of (1) Criticising but not holding invalid the 1923 contract as to being insufficient in form and wording on misstatement of facts and based on inapplicable authorities, and (2) holding on unsound reasoning and on inapplicable authorities that whatever royalty rights were granted by the 1923 contract

were lost and released as to the 380 acres when Mrs. Lucretia M. Garvin in 1930, joined by her husband J. R. Garvin, conveyed to one Wade 755 acres of land owned and put into the 1923 contract by the Garvins, and (3) holding therefore that it was not necessary for such Court to *even* consider what the original effect of the 1923 contract was!

We submit that the said actions of both the trial court and the state Supreme Court on appeal on their face were based on inadequate and unsubstantial grounds and exhibited a clear disregard as to the rights of petitioners by reason of the 1923 contract.

And that the dissenting opinion shows same in more detail than we should take the time here to particularize.

FEDERAL QUESTIONS RAISED BELOW

Petitioners had no warning and could not reasonably anticipate that the Oklahoma Supreme Court would so lightly treat and consider their contractual rights in violation of their Constitutional guaranties until same was done, but thereafter petitioners seasonably filed in the state Supreme Court their second petition for rehearing (Tr., 217) asserting their constitutional rights, which was a Federal claim timely made. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. Ed. 1107.

Such Federal claim was denied without opinion.

ARGUMENT AND REASONS FOR GRANTING CERTIORARI

1. Certiorari should be granted in the instant case because it is important that a state court be not permitted upon inadequate and unsubstantial grounds and specious arguments and subtle reasoning to entirely ignore, defeat and vacate a plain, unambiguous written contract plainly evidencing the intention of the parties, in violation and disregard of the due process clause of the Federal Constitution.

2. And especially so where the state trial court first renders judgment fully upholding the contract and then vacates such judgment and grants new trial and declares the contract void on an inapplicable decision of another state, and on inadequate grounds which are not even approved by the state Supreme Court on appeal.

3. And certiorari should be granted here where the state Supreme Court on appeal refuses and declines to pass upon the validity, legality and effectiveness of the contract but instead holds, on entirely inadequate grounds, that vested rights created in 380 acres of land have been lost and released by conveyance of another and different 755 acres of land. This in effect is like saying that when a boy trades off his orange that he has lost his apples also! Or the unheard of action of a jury in the trial of a criminal case in passing over the question of the innocence or guilt of the defendant, and in deciding that no punishment should be assessed against the defendant and therefore it would not be necessary to determine his innocence or guilt!

4. We assert that the 1923 contract is fair on its face and should be upheld, and we fully expected that the state Supreme Court on appeal would *reinstate* the original judgment of the trial court, and that petitioners are entitled to consider that they have been deprived of their property and rights without due process or fair trial, that had the state Supreme Court proceeded to determine the legality or lack of same in such contract from its face that such Court would have been bound to determine in favor of the legality of the contract; that the holding by such Court that the royalty rights in the 380 acres were lost by conveyance of 755 different acres, is unsupported by law or fact and is devoid of equity. What if only half of the 755 acres had been conveyed? Would that have resulted in a loss of half of the royalty rights in the 380 acres? Certainly the answer is that conveyance of the 755 acres had no effect whatever on ownership of royalty rights in the 380 acres, as is ably pointed out in the dissenting opinion.

5. Also the state Supreme Court majority opinion ignored the fact that the 1923 contract was duly recorded as a conveyance and was notice of its contents to the world; that when respondent took title in 1929 to the 380 acres from his father and mother who were parties to the 1923 contract, that deed to him (Tr., 76) recited "This deed is given subject to any valid contract or lease now on record against this land or which may be placed of record by me during my lifetime"; that the 380 acres at the time of the 1923 contract was owned

and put into the contract by J. M. Littrell and wife and Thomas Pettigrew, and when the interest of the Littrells in the surface to such 380 acres was deeded by them to Thomas Pettigrew before he conveyed same to respondent, such deed (Tr., 106) contained the recital: "It is expressly understood and agreed that this conveyance affects the surface rights only, the mineral rights having heretofore *been disposed of* by a contract between the parties hereto *and others* as appears *of record* in the office of the County Clerk of Stephens County, Oklahoma," which clearly referred to the 1923 contract and further burdened the ownership of such 380 acres with the 1923 contract; that respondent H. C. Pettigrew sought and obtained quit claim deed on the 380 acres in 1931 (Tr., 80) from others including J. R. Garvin but not from Lucretia Garvin (then deceased) nor from petitioners *in order to free* the 380 acres from the 1923 contract as he testified on trial (Tr., 57-58), thereby admitting that the royalty rights under the 1923 contract were then in existence and recognized by him, since it took and he sought quit claim deed to release such rights.

6. The Oklahoma Supreme Court in its majority opinion ignored its own former holding in *McCullough* v. *Ba*... 94 P. 2d 543, that:

> "A properly executed written agreement which was based on valuable consideration, and which provided that landowners granted to grantee an undivided fractional interest in and to oil and gas royalty, which was or should thereafter be reserved, exclusive of oil and gas bonus and rental money, *conveyed a vested right* to recei...

such fractional part of royalty reserved to owners under any lease then existing or thereafter executed, within stipulated period."

And said court also ignored its former holdings in *Porter* v. *Warner-Caldwell Oil Co.*, 80 P. 2d 252, and *Burns* v. *Bastian*, 80 P. 2d 377, that:

"Oil and gas royalties are a proper subject of sale or grant."

7. The result of the majority opinion is in discord with decisions of this Court:

"When it is proposed to set aside, to annul * * * a written instrument * * * the testimony * * * must be clear, unequivocal and convincing, and it cannot be done upon bare preponderance of evidence which leaves the issue in doubt."

U. S. v. *Maxwell Land Co.*, 7 S. Ct. 1015, 121 U. S. 325, 30 L. Ed. 949;

Tiernan v. *Jackson*, 30 U. S. 580, 8 L. Ed. 234, and many others.

"The great rule of interpretation, with respect to deeds and contracts, is to put such a construction upon them as will effectuate the intention of the parties, if such intention be consistent with the principles of law."

Hollingsworth v. *Fry*, 4 U. S. 345, 1 L. Ed. 860;

Hoge & Co., v. *Grossman*, 5 U. S. 214, 2 L. Ed. 86.

CONCLUSION

Therefore petitioners respectfully request that writ of certiorari issue to the Supreme Court of the State of Oklahoma.

Respectfully submitted.

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JULY, 1960.